STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2001
v	No. 216492 Genesee Circuit Court
DEXTER DURRELL COOPER, Defendant-Appellant.	LC No. 98-002306-FC

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, one count of assault with intent to rob while armed, MCL 750.89, and one count of possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant's convictions stem from his alleged involvement in a bank robbery in Flint on September 22, 1997. He was sentenced to three concurrent terms of fifteen to thirty years' imprisonment, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm, but remand to allow the trial court to strike certain information from the presentence report.

I. Jury Selection

First, defendant argues that the trial court's jury-selection procedures were erroneous. Defendant was tried jointly with his girlfriend, who allegedly assisted him during the bank robbery. Under MCR 6.412(E)(1), each defendant was entitled to ten peremptory challenges, while the prosecutor was entitled to twenty. The trial court required the parties to exercise their peremptory challenges alternately, in the following rotation: the prosecutor, defendant, and the codefendant, and so on. Each party, in turn, was allowed to either exercise a peremptory challenge, or pass. See MCR 2.511(E)(3); MCR 6.412(A).

Defendant argues that, where there are multiple defendants, the trial court must follow a different rotation: the prosecutor, defendant #1, the prosecutor, and defendant #2, and so on. The premise underlying defendant's argument is that each party should generally exhaust its peremptory challenges at the same time. However, defendant cites no authority in support of this premise. Indeed, this Court has twice rejected this identical argument. See *People v Finney*, 113 Mich App 638, 641; 318 NW2d 519 (1982), and *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 146-148; 324 NW2d 782 (1982). Moreover, MCR

2.511(E)(3)(c) specifically contemplates a situation in which one party will have exhausted all of its peremptory challenges and the other party has peremptory challenges remaining. Defendant's argument is without merit.

Additionally, although the trial court violated MCR 2.511(F) by allowing the prosecutor to exercise multiple peremptory challenges before replacing excused jurors, reversal is not required where defendant failed to object. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987); *People v Lawless*, 136 Mich App 628, 636; 357 NW2d 724 (1984).

II. Prosecutorial Misconduct

Next, defendant argues that he was denied a fair trial by improper prosecutorial argument. Defendant failed to object to most of the comments that he now challenges on appeal, and we review these unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because defendant concurred in his codefendant's motion for a mistrial relating to two comments, his challenges to those two comments are preserved for appellate review, and we examine the challenged remarks in context to determine whether defendant was denied a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). We conclude, upon review of the entire record, that defendant was not denied a fair trial by prosecutorial misconduct.

A

A key prosecution witness admitted to having been convicted of larceny from a retail store. During closing argument, the prosecutor commented that the witness had simply stole "some little stuff." Defendant did not object to this comment, and reversal is not required unless plain error affected his substantial rights. *Carines*, *supra* at 763.

The record does not reflect the nature, quantity, or value of what the witness stole. Therefore, the prosecutor improperly commented on matters not supported by the evidence. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). However, reversal is not required. Evidence of prior theft-based convictions is admissible to impeach a witness because "theft offenses have traditionally been viewed as strongly probative of veracity." *People v Allen*, 429 Mich 558, 595; 420 NW2d 499 (1988). It is the fact that the witness committed a theft that negatively affected his credibility—not whether what he stole was of little or much value. The impeachment value of the prior conviction was not diminished by the prosecutor's comment, and defendant has failed to show prejudice. There was no plain error affecting defendant's substantial rights.

B

The prosecutor argued that the evidence suggested that defendant and his codefendant fled the Flint area after the robbery and evaded arrest for some time. Defendant claims that the evidence did not support this argument. Contrary to defendant's argument, the prosecutor presented evidence that defendant's home, when searched by police shortly after the robbery, had been left in haste. The oven was still on, and it appeared that dinner had recently been cooked. Also, police officers conducted surveillance of the area, and defendant was never observed,

although he claimed to have been living in the area at a friend's house while his house was being repaired. Based on this evidence, the prosecutor properly argued that there was evidence of flight. A prosecutor is free to argue all reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

C

Defendant also claims that the prosecutor improperly referred to the school-district boundaries, which was a matter not in evidence. However, the record belies defendant's claim. The evidence showed that defendant's daughter had been transferred to a school outside the City of Flint, although the house in which defendant claimed to be living would have been within the Flint School District. The codefendant admitted that she had family in the area of their daughter's new school. The prosecutor argued that this suggested that defendant and the codefendant had fled the Flint area and left their daughter with relatives outside of Flint. The prosecutor's argument was a permissible inference from the evidence. *Bahoda*, *supra* at 282.

D

Defendant also complains that the prosecutor commented on his unemployment during the months between the charged bank robbery and his arrest. Although evidence of unemployment or poverty is inadmissible to show that a defendant is more likely to commit the charged crime, *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980), it may be admissible to refute the defendant's theory of the case. *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986). Here, the context of the prosecutor's remark makes it clear that the reason for discussing defendant's unemployment was not to portray him as a poor, shiftless man who was likely to commit a bank robbery. Rather, the prosecutor was bolstering the argument that defendant fled the Flint area. Although defendant claimed to be living in the Flint area while the police were seeking to arrest him, his lack of employment in the area tended to refute that claim. The prosecutor's argument was proper.

E

Defendant also claims that the prosecutor improperly bolstered the credibility of key prosecution witnesses by arguing that the police officers were experienced and knew whom to believe. Defense counsel suggested during closing argument that the witnesses were actually the perpetrators of the bank robbery and that they fooled the police into believing that defendant and his codefendant committed the crime. In response, the prosecutor argued that the police officers were experienced and that "if they [defense counsel] want to say, because that's their inference, that George Cook and Pearl Ruffin just duped everybody, you judge for yourself how believable that is."

Generally, it is improper for a prosecutor to place the prestige of the prosecutor's office or that of the police behind the assertion that a defendant is guilty. In *People v Lucas*, 138 Mich App 212, 220-221; 360 NW2d 162 (1984), we held that it was improper for the prosecutor to argue that the police had checked out a witness' alibi and concluded that he was not a suspect. However, the prosecutor's comments must be considered in the context of the comments made by defense counsel. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

"[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, the prosecutor's comments were an appropriate response to defense counsel's insinuation that the prosecution witnesses had fooled the police. Under these circumstances, defendant has not shown plain error affecting his substantial rights. *Carines*, *supra* at 763.

F

Defendant also argues that the prosecutor improperly suggested to the jury that he was driving a stolen vehicle at the time of his arrest. Apparently, when the police arrested defendant, he was driving a car that had been car-jacked. Before trial, the prosecutor stated that he had no intention of introducing evidence of the stolen vehicle. However, during defendant's testimony, defendant denied any knowledge of the vehicle at all. During closing argument, the prosecutor argued that defendant's denial, in the face of testimony that he was driving the vehicle when arrested, tended to impeach defendant's credibility when he also denied having ever owned a motorcycle, which was the getaway vehicle for the bank robbery. Defendant joined in his codefendant's motion for a mistrial, which was denied by the trial court.

Viewed in context, the prosecutor's comments never insinuated that the vehicle was stolen. Rather, the prosecutor argued that defendant's lack of truthfulness about having a vehicle suggested that he was untruthful when he denied ever owning a motorcycle. It is appropriate for the prosecutor to argue from the evidence that a witness is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's argument was proper.

G

Finally, defendant argues that the prosecutor improperly shifted the burden of proof by commenting on his failure to call a witness to rebut certain allegations. Defendant joined in his codefendant's motion for a mistrial, and although the trial court denied the motion, the court granted a curative instruction. The court stressed to the jury that defendants had no obligation to produce witnesses and the prosecutor bore the full burden of proving each element of the charged offenses beyond a reasonable doubt. "The goal of a defense objection to improper remarks by the prosecutor is a curative instruction." *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Here, that goal was accomplished. The trial court's curative instruction removed any prejudice that could have resulted from the prosecutor's ill-advised comment. Defendant was not denied a fair trial.

III. Exclusion of Defense Evidence

Defendant claimed that, at the time of the robbery, he was at a job-placement center seeking employment. The person with whom he claimed to be living at the time, Erica Burke, testified that, on the morning of the robbery, defendant left the house and returned an hour later. When defense counsel asked Burke where she understood defendant to be going, Burke began to respond, "He told me that he—"; however, the prosecutor objected on the ground that the prosecutor's statement was hearsay. The trial court told defense counsel that the statement was

inadmissible, "unless you lay a foundation for an exception to the hearsay rule." Defense counsel did not attempt to lay such a foundation, but instead simply moved on to a different line of questioning. Defendant's failure to provide an adequate offer of proof renders this issue unpreserved. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Defendant must therefore demonstrate plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant argues on appeal that his statement regarding where he was going was admissible under the "state of mind" hearsay exception found in MRE 803(3). Defendant is correct. A statement expressing the declarant's plan to go to a specific destination falls within MRE 803(3). *People v Howard*, 226 Mich App 528, 552-554; 575 NW2d 16 (1997). However, defendant has not shown that he was prejudiced by the exclusion of the statement. Because defendant never made an offer of proof, neither the trial court nor this Court can know with certainty what Burke's answer would have been. It is entirely possible that she would have testified that defendant said that he was going someplace other than the job-placement center, which would have undermined defendant's alibi defense. Defendant, as the appellant, bears "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument on which reversal is predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not shown plain error affecting his substantial rights.

IV. The Trial Court's Flight Instruction

Next, defendant argues that the trial court should not have instructed the jury that there was evidence of flight. Defendant failed to object to the instruction given; thus, we review this issue for plain error affecting substantial rights. *Carines, supra* at 763.

A trial court should give only jury instructions that are supported by the evidence. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). Here, the evidence supported an inference that defendant fled the Flint area after the robbery and evaded arrest. Therefore, the trial court properly instructed the jury on how to consider evidence of flight.

Defendant also argues that the court's instruction was worded in such a manner as to encourage the jury to suspend its powers of judgment in favor of the court's determination that the evidence showed flight. However, jury instructions must be viewed as whole, not piecemeal. *People v Brown*, 239 Mich App 735, 746; 610 NW2d 234 (2000). Taken as a whole, the court's flight instruction clearly informed the jury that it must decide whether defendant tried to hide or conceal himself and, if so, whether that demonstrated a consciousness of guilt. Defendant's argument is without merit.

V. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel. Because defendant failed to preserve this issue by moving in the trial court for a new trial or an evidentiary hearing, our review is limited to mistakes apparent from the existing record. *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Effective assistance of counsel is presumed, and the defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant argues that trial counsel was ineffective by failing to adequately impeach the testimony of two key prosecution witnesses. Typically, the questioning of witnesses is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Here, we conclude that counsel adequately impeached the testimony of both witnesses. Counsel's failure to question police officers about statements the witnesses made would not have affected the outcome of the proceeding. Where counsel rigorously cross-examined the witnesses and impeached their credibility, counsel's decision not to impeach them further by other methods was a matter of trial strategy. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987).

Defendant also argues that counsel was ineffective by failing to object to the prosecutor's comments during closing argument. However, most of the prosecutor's comments were proper, so any objection would have been futile. Counsel is not required to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, defendant has not shown that, had counsel objected, there is a reasonable probability that the result of the proceeding would have been different. *Stanaway*, *supra* at 687-688.

VI. Jury Instructions Before Closing Arguments

Next, defendant argues that the trial court violated MCR 6.414(F) by instructing the jury before the parties made their closing arguments. Defendant failed to object, so we review this issue for plain error affecting substantial rights. *Carines*, *supra* at 763. Under MCR 6.414(F), the trial court must instruct the jury after the closing arguments are made. However, the rule also provides for an exception: "with the parties' consent, the court may instruct the jury before the parties make closing arguments." MCR 6.414(F). Here, the trial court instructed the jury before closing arguments, but the court did not obtain the consent of the parties on the record.[1] Therefore, the court appears to have violated the court rule.

[1] Although a bench conference was held immediately before the court proceeded with jury instructions, we decline to infer consent from an off-the-record bench conference. If counsel for the parties consented, the trial court should have placed that consent on the record.

However, reversal is not required because defendant has not shown that he was prejudiced by this procedure. Defendant argues that he was prejudiced because the jury began its deliberations with the prosecutor's contentious rebuttal argument fresh in its memory. Defendant claims that, in light of the complexity of the case and the heated tone of the arguments, this would have diverted the jury from calmly evaluating the evidence. We are not persuaded. It is just as likely that defendant benefited from the trial court's procedure. Before the contentious closing arguments were made, the trial court instructed the jury that the arguments of counsel are not evidence and those arguments should be accepted only to the extent that they are supported by the jury's common-sense understanding of the evidence. Thus, when the jury heard the prosecutor's argument, it was hearing it through the "filter" of the court's instructions. In the absence of any objection, which would have allowed the trial court to avoid or correct the error, we conclude that defendant has not shown any prejudice.

VII. Inaccuracies in the Presentence Report

At sentencing, defendant challenged the accuracy of three items in the presentence report. First, defendant objected to a reference that a witness knew defendant to sell and use drugs. Second, defendant objected to a reference that he spent thirty days in jail for an offense where he recalled only having been placed on probation. Third, defendant objected to a reference to gang-affiliated material found in defendant's home. The trial court granted defendant's request to strike the reference to gang affiliation, and the court indicated that the other matters would not have any significance on the sentence imposed.

On appeal, defendant argues that the reference to gang affiliation was never in fact removed from the presentence report. However, the trial court granted defendant's request. If the court's order has not been implemented, defendant should petition the trial court to see that its directive is carried out. Defendant also argues that the trial court should have ordered the other information stricken from the report. We agree. Where the trial court concludes that challenged information will not be taken into account in sentencing, the court must order the information stricken from the presentence report. MCL 777.14(6); MCR 6.425(D)(3). We remand to allow the trial court to order the information that was disregarded stricken. *People v Martinez (After Remand)*, 210 Mich App 199, 202-203; 532 NW2d 863 (1995), overruled on other grounds 450 Mich 1025 (1996).

Defendant also challenges other information contained in the presentence report, but he failed to object to that information at sentencing or as soon as the alleged inaccuracy could reasonably have been discovered. Therefore, defendant's challenges are not preserved for appellate review. MCR 6.429(C); *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Defendant also argues that, despite the trial court's statement that the information about him selling and using drugs was not a factor in sentencing, the court considered that information anyway. We presume that the sentencing court considered only the information that was properly before it. *People v Alexander*, 234 Mich App 665, 672; 599 NW2d 749 (1999). Defendant has not demonstrated anything that would overcome that presumption.

Affirmed, but remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra